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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

MILLARD V. IRWIN, Owner of the Yacht, "JOMIE",
Petitioner,

vs.

EAGLE STAR INSURANCE COMPANY, LTD.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

G. E. HARTWIG
220 S.E. 12th Street
Ft. Lauderdale, Florida
33316

ARTHUR ROTH and
CHARLOTTE J. BARKAN ROTH
1111 Ainsley Building
14 N.E. First Avenue
Miami, Florida 33132

Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

PETITIONER, Millard V. Irwin, owner of the Yacht "Jomie", prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on February 29, 1972.

OPINION BELOW

The Opinion of the Circuit Court and the Findings of Fact and Conclusions of Law of the District Judge are set forth verbatim in the appendix hereto. The opinion of the Court of Appeals is reported as *Irwin* v. *Eagle Star Insurance Co., Ltd.*, 455 F.2d 827 (5th Cir. 1972). The District Court's opinion is not reported.

JURISDICTION

The judgment of the Court of Appeals was made and entered on February 29, 1972. Rehearing was denied April 13, 1972. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1). This review is sought to resolve the conflict between the opinions of the Circuit Court and decisions of this Court and other Circuits, and conflict with the prior opinions of other panels of the Fifth Circuit. The opinion below presents serious questions of the application of the Constitutional grant of power over admiralty and maritime matters to the Federal Government and the Federal Courts, and the uniformity of application thereof throughout the Nation.

QUESTIONS PRESENTED

1. Whether marine insurance policies are to be interpreted uniformly pursuant to Federal maritime law, or diversely under State law according to the lex loci contractu based on a formula of "contacts"?

2. Whether the ancient and standard "Inchmaree" clause of a marine hull insurance policy shall receive uniform interpretation and application in all the courts of the Nation, or be the subject of varying interpretation and application by the different States and Federal Courts?

3. Whether the Court of Appeals correctly applied the Rules of Civil Procedure by not remanding the cause to the District Court for a ruling on issues reserved by him as being superfluous under his trial findings, but rendered pertinent by the appeal in which the judgment was vacated?

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2, Clause 1, of The Constitution of the United States, provides:

> "The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - - - to all Cases affecting Ambassadors, or other Public Ministers and Consuls; - - - to all Cases of admiralty and maritime jurisdiction; - - - * * *."

There are no Federal or State statutes involved.

STATEMENT OF THE CASE

Petitioner, Millard V. Irwin was the owner of the Yacht "Jomie," which he insured with the Respondent Eagle Star Insurance Co., Ltd. The company issued a standard marine hull insurance policy containing the ancient and venerable "Inchmaree" clause on latent defects:

> "This insurance also specially to cover,
>
> * * *
>
> "Bursting of boilers, breakage of shafts or any latent defects in machinery or hull (excluding, however, the cost and expense of repairing or renewing the defective part) * * *
>
> * * *
>
> "Provided such loss or damage has not resulted from want of due diligence by the owners of the yacht, or any of them, or by the Manager or by the Assured."

Some time prior to placing the insurance, the vessel was surveyed by Capt. Chester Holland, appointed by the Respondent to determine its insurability, and Holland found it in very good "yacht" condition, although some-

what dishevelled from the evidence of ongoing repairs and maintenance.

Prior to the time Holland surveyed the vessel, Petitioner had placed it with a reputable and experienced firm for the installation of air-conditioning. Unknown to him, a one-inch steel nipple elbow was fitted to connect two ends of a brass pipe. The entire piping was painted black, and the two metals could not be distinguished to the naked eye. Holland did not make such a distinction during his survey for the Respondent. In fact, at the trial, Holland testified that after the casualty, he surveyed the damages for Respondent, saw the condition, and noted that this was the first time he had ever come across this condition in his entire experience.

After placing the insurance, the vessel went to sea, and Petitioner maintained it in very good condition. The trial judge found him to have been a very prudent yacht owner with good experience, who took good care of the vessel.

The trial judge also found that the Petitioner made frequent inspections of the bilge and the air-conditioning piping, and had no reason to suspect that something was going bad because the defect was hidden from view under the coating of black paint.

Some six months after the installation of the air-conditioning system, the "Jomie" was tied to the dock one afternoon with no premonition of impending disaster. During the night, while unoccupied, the yacht sank. The steel nipple elbow had broken due to electrolysis causing a separation of the pipe from the sea strainer in the water intake of the air-conditioning system, allowing sea water to fill the vessel.

It is an established, elementary and well-known fact that the action of sea water and sea air on two different metals in contact causes rapidly accelerated electrolysis, resulting in damage to the molecular structure of the metals, destroying both metals where they meet. The process is hidden in that the destruction occurs inside the overlapping areas, and is usually detected only after the collapse of the metals and their separation. (In this case it was further hidden because it was occurring beneath the black paint.)

However, experienced maritime men are aware of this danger and strive to prevent its occurrence and eliminate it upon discovery. On the other hand, the District Judge found, a reasonably prudent seafarer who contracts with a competent, reputable firm of wide maritime experience, would presume that this type union would not be made, and certainly would have no reason to suspect one hidden beneath a coat of black marine paint.

The trial judge found that the Petitioner acted diligently under the circumstances, and concluded that the sinking and loss was covered by the latent defect coverage of the "Inchmaree" clause. Judgment was entered on May 13, 1971, and Appeal taken therefrom to the United States Court of Appeals for the Fifth Circuit.

The facts found by the trial judge are supported by substantial competent evidence, are not clearly erroneous and presumed correct, *McAllister* v. *United States*, 348 U.S. 19 (1954), and were therefore not disturbed by the Court of Appeals. However, the Court of Appeals did reverse the conclusion that the damage caused by the latent defect was covered by the insurance, holding it was erroneously based on Federal decisional law, rather than Florida decisional law. No state or Federal statutes or statutory provisions are involved.

The Court Below held that the "Inchmaree" clause should have been interpreted in accordance with the decision of an intermediary appellate court of Florida, *Egan* v. *Washington General Insurance Corp.*, 240 So.2d 875 (Fla. App. 1970), in which it was held that the latent defect must be in the structure of the metal rather than the hidden negligent installation by an independent contractor of otherwise new parts. The Fifth Circuit impliedly agrees that this Florida ruling conflicts with Federal interpretations by its own Court of the same coverage. The Supreme Court of Florida has not ruled on this point.

The conflict between Federal and Florida rulings turns on the interpretation of a simple, everyday word, which educated people consider fairly common, and of readily accepted meaning. Capt. Holland, on direct examination by the insurance company attorney, was asked the meaning of the words latent defect, and he responded, at page 226 of the typewritten transcript:

> "A. Latent defect - - - When normal words are put into special interpretation, many times they don't mean what they say. However, in this particular case it means pretty much exactly what it says, a latent or hidden defect that isn't obvious to the naked eye."

Funk & Wagnall's Standard Dictionary of the English Language, International Edition, 1965 defines the word:

> "Latent, adj., Not visible or apparent; hidden; dormant."

Applying these simple standards, the trial judge, impressed by Holland's testimony that he couldn't tell there were different metals in the connection, and the owner's testimony that he couldn't tell or suspect the defect be-

neath the black paint, and further that it is not a standard procedure in marine work, found that the defect was in fact latent within the meaning of the policy causing "accelerated wear and tear," as distinguished from ordinary wear and tear, which would be excluded from coverage.

REASONS FOR GRANTING WRIT

A. Argument of Law Re: Inchmaree Interpretations

It is now an established fact in this case that the defect lay hidden and dormant, not visible to the naked eye. It was latent in a practical sense. To now hold it means one thing in Florida, or another thing in Florida under slightly altered circumstances, or another thing some place else, would seem to do violence to the simple understanding of the insured when he purchased the insurance and paid the premiums. He probably could have gotten a more satisfactory result in another jurisdiction. In fact, the Florida interpretation came after he purchased his policy, and apparently altered its terms. *Dartmouth College* v. *Woodward*, 4 Wheat 518, 4 L.Ed. 629 (1819).

Insurance shouldn't be a "snare to the insured and a barren hope to the injured." *Lorando* v. *Gethro*, 117 N.E. 185, 189 (Mass. 1917).

Federal cases seem to be uniform in holding that the sole test to determine latency is the ability to discover the defect by reasonable, prudent and customary inspection. By reversing the trial court's conclusions (spelled out in the opinion), the Court of Appeals has now thrown the law into the state of confusion readily predicted in 1957 by Professors Grant Gilmore and Charles L. Black, Jr., of Yale Law School, in their standard text, The Law of Admiralty, The Foundation Press, Brooklyn, 1957.

Definitions by the courts of the term "latent defect" have always been consistent with each other and dictionary definitions, as being a "hidden defect." *Tropical Marine Products* v. *Birmingham Fire Ins. Co.* (*Sea Pak*), 247 F.2d 116 (5th Cir. 1957); *Saskatchewan Gov't Ins. Off.* v. *Spot Pak, Inc.*, 242 F.2d 385 (5th Cir. 1957), at fn 6, p. 391; *Waterman S.S. Corp.* v. *U. S. Smelting* (*S.S. West Kyska*), 155 F.2d 687 (5th Cir. 1946), cert. denied, 329 U.S. 761; *The Bill*, 145 F.2d 470 (4th Cir. 1944), affirming 47 F.Supp. 969 (D. Md. 1942); *Mattson* v. *Connecticut Fire Ins. Co.*, 80 F.Supp. 101 (D. Minn. 1948); *The Rensselaer*, 1925 A.M.C. 1116; *Ferrante* v. *Detroit Fire & Marine Ins. Co.*, 125 F.Supp. 621 (D. Cal. 1954).

Having seen the hidden nature of the defect in this cause, the closest analogy to be made is in the welding cases. *The Esso Manhattan*, 1953 A.M.C. 1152 (S.D. N.Y.), seems to indicate the thrust of Federal interpretation of the Inchmaree coverage. In that case, notches in defective welding in the deck plating were held to be latent defects in the hull causing fracture of the vessel. It should be quite apparent that defective welding is as much due to the method used as was the materials on the "Jomie." In fact, in the *Esso Manhattan* case, the defect was traced to the method of welding, not to defective welding materials, and seemed to have been a discoverable defect because of its frequency in similarly welded ships. *National Bulk Carriers* v. *American Marine Hull Insurance*, 1949 A.M.C. 340 (arbitration case), and citations therein.

The Eastern District of Louisiana held that improperly fitted parts in a valve, which could not be detected without tearing down the valve, is a latent defect. *National Sugar Refining Co.* v. *M/S Las Villas*, 225 F.Supp. 686 (E.D. La. 1964). It was held that tearing down the valve is not required for reasonable inspection.

Another District Court of Appeals of Florida, the Third District, relied on Federal interpretation of latent defect to provide coverage to a shipowner, only a few months before the *Egan* ruling in the Fourth District. *Continental Ins. Co.* v. *Levinson,* 224 So.2d 445 (Fla. App. 1969).

The Third District of Florida again in a decision in early 1970, before *Egan,* supra, affirmed a trial court finding of Inchmaree coverage for negligent joinder of a brass fresh water pipe by a flexible, 8-inch rubber tube by improper clamping, causing separation and flooding. The facts are not reported, but the court would presumably follow this decision in conjunction with its *Continental Ins. Co.,* holding, to present the open conflict of District Courts of Appeal in Florida, which only the Supreme Court of Florida, or this Court, could resolve. The trial court had found in a lengthy opinion, which is in the court's appellate file, that the condition was hidden under layers of insulation, and reasonable inspection did not require dismantling the insulation.

The United States Court of Appeals for the Ninth Circuit holds that ordinary meaning should be given the term in Inchmaree cases, although not to cargo cases. *Larsen* v. *Ins. Co. of North America,* 362 F.2d 261 (9th Cir. 1966).

While Louisiana in direct conflict with Florida Fourth District Court of Appeals, and in agreement with the Third District of Florida, holds that Federal law is applicable to interpretation of Inchmaree coverage, and refuses to apply its own land-locked cases to the maritime law. Rejecting the standards set in a non-maritime case, *Schon* v. *James,* 28 So.2d 531 (La. App. 1946), as inapplicable to the Inchmaree coverage, the court held in *Anders* v. *Poland,* 181 So.2d 879 (La. App. 1966):

> "To interpret the disputed clause and the law applicable, we must rely on general maritime law which governs policies of marine insurance. *Insurance Co.* v. *Dunham*, 78 U.S. 1 (1870); *Chlenh's* v. *Luckenbach S.S. Co.*, 247 U.S. 372 (1918); *Wunderlich* v. *Netherlands Insurance Co.*, 1955 A.M.C. 1659, 125 F.Supp. 877 (S.D. N.Y. 1955)."

Reliance by the Fifth Circuit on state law for interpretation of the Inchmaree coverage is therefore not practical in international trade.

There is a body of Federal decisional law applying the Inchmaree latent defects clause as interpreted by another panel of the Fifth Circuit through now Chief Judge John R. Brown, and relied upon by the trial court herein. *Tropical Marine Products* v. *Birmingham Fire Insurance Company of Pennsylvania* (*The Sea Pak*), 247 F.2d 116 (5th Cir. 1957).

In the *"Sea Pak"* case, Judge Brown set the following criteria as to interpretation of the Inchmaree clause:

> "The defect was certainly latent in a practical sense." 247 F.2d, at 121.
>
> * * *
>
> "If it was not discoverable prior to departure for sea by all known and customary tests, it was latent and covered under the policy." 247 F.2d, at 122.
>
> * * *
>
> "If there is an undiscoverable defect in hull or machinery, the resulting unseaworthiness or damage caused by it is nonetheless covered." 247 F.2d, at 123.

In the cause at bar, the defect was certainly latent in a practical sense, it was not discoverable by any known or customary method in that customary inspection is visual,

and no shipowner is required to go around his ship scraping paint off his hull or appurtenances (if so, why paint?) to search for unsuspected defects.

B. Argument of Law

Re: Uniformity of Maritime Law

The policy in "*Sea Pak*" had as many contacts with Florida as did the one at bar, except that the casualty occurred at sea, rather than at a dock in Florida.

The cases that interpret the Inchmaree clause generally recite the history, well-known in admiralty law. The House of Lords in *Thames & Mersey Marine Ins. Co.* v. *Hamilton, Fraser & Co.*, 12 App. Cas. 484 (1887), reversed the court of appeals and limited coverage on standard policies where the industry had presumed shipowners were protected.

In order to furnish expanded protection denied shipowners by the decision, the underwriters introduced the Inchmaree clause for the benefit of their insureds. The clause takes its name from the S.S. Inchmaree, which was involved in the *Thames & Mersey* case. At first, the coverage was assumed to be only for restoration of the latently defective part, *Cleveland & Buffalo Transit Co.* v. *Insurance Co. of North America*, 115 Fed. 431 (S.D. N.Y. 1902), and not for damage caused by the defect, so the clause was amended to protect the vessel from the latent defect, but not the defective part itself. *Mellon* v. *Federal Ins. Co.*, 14 F.2d 997 (S.D. N.Y. 1926). There seemed to be universal acceptance and interpretation of its terms and coverage. Shipowners were buying expanded and expanding coverage, rather than narrow coverage.

That is apparently where the maritime industries and marine insurance understood their relationship to be until

the publication of the opinion below. Now it turns out marine insurance is subject to multi-interpretation and varying application in commerce, where uniformity is usually the rule. *Calmar S.S. Corp.* v. *Scott,* 345 U.S. 427 (1953); *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205, 217 (1917).

The Fifth Circuit impliedly concedes that Petitioner is entitled to recover under Federal decisional law, but by its application of the holdings of this court felt compelled to apply state law to the case, holding that all marine insurance, and specifically, Inchmaree clauses, be determined by state law even though it violates the very historical purpose of the coverage. Professors Gilmore and Black saw this decision coming in 1957, and it reaches far beyond the rights of the Petitioner in this narrow case, and beyond even the Inchmaree, extending over into the entire field of marine insurance.

The Court Below arrived at its holding by analysis of this Court's opinions in *Wilburn Boat Co.* v. *Fireman's Fund Insurance Co.,* 348 U.S. 310 (1955); *Kossick* v. *United Fruit Co.,* 365 U.S. 731 (1961).

This Court has long held that a contract of marine insurance is within the admiralty and maritime jurisdiction, *Insurance Company* v. *Dunham,* 78 U.S. (11 Wall.) 1 (1870), although the "savings clause", 28 U.S.C. 1333, broadens jurisdiction (venue) to all courts.

At issue in *Wilburn Boat* was the rejection of coverage on a hull policy where a houseboat burned on a small artificial lake between Arkansas and Texas, the underwriter refused coverage because the assured breached the private pleasure warranty of the policy. A Texas statute bars insurance from rejecting coverage for assured's breach of a warranty if the breach is unrelated to the loss. The trial

court and the Fifth Circuit upheld the underwriter's contention, and ruled that the breach of any warranty by the assured is grounds for denial of coverage, however remote the breach may be from the cause of the casualty. This strict construction of contract law to the boating public seems harsh and unnecessary and not consonant with admiralty's traditional equitable jurisdiction.

On this basis this Court held that state statutory law regulating insurance companies could supplement the general admiralty law in areas where it is silent, or in cases where a harsh rule should be ameliorated. However, if we examine admiralty law in the light of the equitable considerations of *Wilburn Boat*, we consistently find cases where mere breach of a duty is not grounds for absolute consequences unless such breach was related to the casualty, best exemplified by the rule of *The Pennsylvania*, 89 U.S. (19 Wall.) 125 (1874). Therefore, it would seem that if the policy has a geographical limitation, but the vessel suffers damage through some cause wholly unrelated to its physical location, it would seem that admiralty would accept Texas' statute as a matter of general rule, and *Wilburn Boat* holdings are superfluous to that extent. See, *Saskatchewan Gov't Ins. Off.* v. *Spot Pak*, 242 F.2d 385 (5th Cir. 1957).

Gilmore & Black state that it would be hard to determine what is governed by federal maritime law if the question of a breach of warranty in a marine policy is not so governed. Law of Admiralty, Chapter III, page 62. They then go on to examine the *Wilburn Boat* opinion, and pose the following analysis, at pages 62-65, in trying to understand the implication in that limited situation for this Court's allowance of state statutory law to modify certain provisions of marine insurance:

"(1) States are to be allowed to deal with marine insurance substantive law only when it happens that such cases have not presented themselves to the federal courts in such number or with the issues so posed as to result in decision of the point involved. This criterion would make a sheer crazy quilt of the subject. Some of the most important and obvious propositions in marine insurance law are rarely litigated.

"(2) States may interfere by statute, but not by decisional law. Perhaps it is enough to point out the collision between this point of view and the philosophy of *Erie R.R.* v. *Tompkins,* 304 U.S. 64 (1938)."

". . . the implication of *Wilburn* would appear to be that marine insurance law as a whole is to be excised from the general maritime law inferentially adopted by the Constitution * * * It will be a true *tour de force* to hold that the federal maritime law is supreme in regard to seamen's suits for maintenance and cure and for indemnity for injuries suffered through unseaworthiness, cf., *Pope & Talbott* v. *Hawn,* 346 U.S. 406 (1953), and at the same time to hold that marine insurance is not governed by federal law."

In closing their analysis of *Wilburn Boat* at page 63, the professors find it impossible to advise of its future application in the law, and warn the reader "of the incertitudes that case has introduced."

The Fifth Circuit examined the case much the same as Gilmore & Black. The Court Below had the advantage of Mr. Justice Harlan's opinion in *Kossick* v. *United Fruit Co.,* supra, and determined that this Court retreated somewhat from *Wilburn Boat,* tending to limit it, but concluded that, "Kossick did an incomplete job of burying *Wilburn Boat* obeisance to state contract law in certain cases in-

volving marine contracts." We would submit that this is an erroneous analysis, and that *Wilburn Boat* was intended to be narrowly applied to statutory regulation of insurance companies in dealing with the public, and not to allow creation of 50 or more bodies of decisional law interpreting standard provisions of marine insurance policies.

We can visualize many areas where marine insurance should be the subject of state control and regulation, such as the qualification to do business by corporate structure and financial responsibility, the existence or non-existence of a contract, the enforceability of a claim (in Florida through taxation of attorneys' fees, transcript pages 278-279), joinder of the underwriter as a real party in interest in suits for torts against its assureds, as by statute in Louisiana, *Maryland Casualty Co.* v. *Cushing,* 347 U.S. 409 (1954), or through judicial decree, as in Florida, *Shingleton* v. *Bussey,* 223 So.2d 713 (Fla. 1969); method of serving process and adequacy of process in "savings clause" cases against the underwriters in suits such as that herein, cancellations by the carrier, limitation of actions, or, as in *Wilburn Boat,* relationship between breaches of warranties and loss. These are all matters regulated by statute, none by decisional law.

There are also matters governing the internal structure of the corporation and its operations in their fiduciary relationship with the public and state regulatory bodies. *Wilburn Boat* specifically discusses this type regulation. Certainly, Gilmore & Black feel this interpretation of the opinion would be in keeping with the requirements of international commerce, at pages 44-45:

> "Viewed in this light, the decision seems to make serious inroads on the uniformity of the maritime law. Marine Insurance is the world-wide maritime subject

par excellence; subjection of the jural relations arising out of the policy to control by all the seaboard states of the Union is the antithesis not only of the Jensen thesis but also of the common sense underlying that thesis and somewhat obscured by the emotional appeal of the plaintiffs in cases of the Jensen type. The Wilburn case clashes with the whole theory that makes maritime law a federal subject, for if the general substantive law that has hitherto been thought to be implicitly accepted or adopted, on a national basis, by implications of Art. 3, Sec. 2 of the Constitution, does not include a corpus of law governing the chief incidents of the marine insurance policy, then it is hard to say what it does cover. This is not to say, of course, that States might not be left with some regulatory power over marine insurance in the interstices of the federal law; they have that as to all maritime matters."

* * *

"All that can be said in general is that the states may not flatly contradict maritime law, but may 'supplement' it, to the extent of allowing recoveries in cases where it emphatically denies them; that states may legislate freely on shipping matters that are of predominantly local concern, but that they may not so act as to interfere with the uniform working of the federal maritime legal system."

This analysis seems to conform to the reservations expressed by Mr. Justice Frankfurter in his concurring opinion in *Wilburn Boat.* Drawing on his opinion written in the previous term in *Calmar S.S. Corp.* v. *Scott,* 345 U.S. 427 (1953), he stated at 348 U.S., page 323:

"The business of marine insurance often may be so related to the success of many manifestations of com-

mercial maritime endeavor as to demand application of a uniform rule of law designed to eliminate the vagaries of state law and to keep harmony with the marine insurance laws of other great maritime powers."

There is no Federal statutory, or decisional body of law governing or regulating the insurance industry as to corporate structure, financial responsibility, rate schedules, service of process through a statutory resident agent (the State Treasurer-Insurance Commissioner in Florida), and myriad other regulatory factors. Absent Federal assumption of jurisdiction in such matters under either the commerce or maritime clauses, there could be no marine insurance without resort to state insurance and corporate statutory law. To this extent *Wilburn Boat* is correct and should be limited to those areas, without binding Federal admiralty courts to decisional rules of substantive interpretation of standard coverage.

In *Kossick,* and the Fifth Circuit cited the very passage, this Court stated that the application of state law in *Wilburn Boat* was justified on the basis of a lack of any provision of maritime law governing the matter there presented.

On the other hand, the decision of the Fifth Circuit in this case overlooks those of the other panels of that Court in, *The Sea Pak,* supra, and *The West Kyska,* supra, indicating specific Federal provision on the point. Petitioner raised this point in his briefs to the Court, but the Court impliedly rejected the argument, relying instead, on Florida law, which itself is in conflict and unsettled.

It would seem that the Fifth Circuit was inviting review, which would also please the industry, for clarification of the holding in *Wilburn Boat* v. *Fireman's Fund.*

C. Argument of Law

Re: Waiver and Estoppel

The issue of waiver and estoppel was raised by the Petitioner in the trial court. Following the close of testimony, and upon the court announcing the findings of fact and conclusions of law on the issue of liability pursuant to Rule 52 (a) Fed. Rules Civ. Proc., the following colloquy occurred:

> "Mr. Hartwig: Could it be possible, if the Court please that you could make a finding as to the theory of estoppel, which was presented by the plaintiff?"
>
> "The Court: No. I am going to state in the record that the Court is not making any finding on the question of estoppel, and my reason for that is I do not feel it necessary to go to that theory, which has been presented by the plaintiff, and I want the record to affirmatively show that I am making no finding either way on that because I don't believe in making unnecessary findings."

After the Court of Appeals vacated the judgment, Petitioner moved for re-hearing and requested that in the event the judgment was not re-instated, that the cause be remanded for a ruling on the issue of waiver and estoppel.

The following authorities demonstrate that this is a valid issue in cases between marine underwriters and their assureds when the underwriter denies coverage at some later date:

Reliance Ins. Co. v. *Yacht Escapade*, 280 F.2d 482 (5th Cir. 1960)

Florio v. *General Accident Fire & Life Assurance Corp.*, 396 F.2d 510 (2nd Cir. 1968)

Northern Assurance Co. of America v. *Spencer*, 246 F.Supp. 730 (W.D. N.C. 1965)

Jackson v. *M.F.A. Mutual Ins. Co.*, 169 F.Supp. 638 (W.D. Ark. 1959)

Ruffin v. *United States Fire Ins. Co.*, 158 S.E.2d 672 (Va. 1968)

In filing for re-hearing, Petitioner strenuously requested remand for disposition of this issue. The statute was cited for the authority of the Appellate Court to request findings:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. 2106.

Where the appellate court vacates the judgment of the district court, the court should remand the case for disposition of issues raised at the trial, but not ruled on because such ruling was not required by the findings. *Founders Ins. Co.* v. *Rogers*, 281 F.2d 332 (9th Cir. 1960).

The appellate court will remand the cause when the trial court fails to make findings on a material issue. *Kelley* v. *Everglades District*, 319 U.S. 415 (1943); *East Side Church of Christ* v. *National Plan, Inc.*, 391 F.2d 357 (5th Cir. 1968); *Mladinich* v. *United States*, 371 F.2d 940 (5th Cir. 1967); *Employers' Liability Assurance Corp.* v. *Weeden*, 274 F.2d 809 (5th Cir. 1960); *Victory Towing Co.* v. *Bordelon*, 219 F.2d 540 (5th Cir. 1955).

The Fifth Circuit recognizes the principle that the trial judge should dispose of all material issues, even to the

point when they require explanations of findings on material facts. *Lettsome* v. *United States*, 411 F.2d 917 (5th Cir. 1969); *Lettsome* v. *United States*, 434 F.2d 907 (5th Cir. 1970).

It would seem that in the event this court adopts the Fifth Circuit's holding on the Inchmaree issues, the cause should be remanded to the District Court for disposition of the remaining issues raised by the evidence.

Procedural guidelines seem to be confusing when the trial judge reserves rulings in non-jury trials as to the requirement that all issues be determined, and this technical matter apparently should be clarified.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit be granted on the issues presented.

G. E. HARTWIG
Attorney for Petitioner
220 S.E. 12th Street
Fort Lauderdale, Florida
33316

ARTHUR ROTH and
CHARLOTTE J. BARKAN ROTH
Attorneys for Petitioner
1111 Ainsley Building
14 N.E. First Avenue
Miami, Florida 33132

By: .....
ARTHUR ROTH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof was mailed this 5th day of June, 1972, to WALSH, DOLAN & KRUPNICK, Attorneys for Respondent, 402 Court House Square Building, Fort Lauderdale, Florida.

.....

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NUMBER 70-213-Civ-PF

MILLARD V. IRWIN, owner of the Yacht
"Jomie"
Plaintiff

versus

EAGLE STAR INSURANCE COMPANY, LTD.,
Defendant.

(Filed April 23, 1971)

ORAL FINDINGS OF FACT

First, it would be my ruling that this loss is not covered by that paragraph dealing with perils. I am referring now to Page 2 of the insurance policy, and maybe there is no contention that it is. However, to eliminate any doubt, it certainly is not covered by that paragraph as far as I am concerned, which really refers to perils of the seas and other areas.

It is my finding in this case, as the trier of the fact, that the use of the steel elbow in the installation of this air conditioning system created a defect in the machinery of the vessel and that this defect was a latent defect within that definition included in the Latent Defect, Negligence, Risk on Shore, et cetera, clause of the policy involved in this case.

As the trier of the fact, I find that a reasonably well-qualified air conditioning installer would not have used a steel elbow pipe in this locale and that although this is a standard acceptable type arrangement, it is not a standard

acceptable type of material to use in this elbow. It is further my finding that the insured or plaintiff in this case was not aware of this condition, this latent defect, until after the loss had been sustained, until after the part had separated and until after the boat had sunk.

It is further my finding, as the trier of the fact, that the plaintiff not only did not know and was not aware of the different materials but had no reason to be aware of them, and acting as a reasonable person should not have been aware of them, since apparently the installer did paint the steel elbow when all of these parts were installed.

I would further find that apparently there is no conflict but what new parts were used when it was installed and that a reasonable person inspecting this area after such installation, in the words of even Captain Holland, who was an expert, could not have told from such an inspection or it would have been very, very difficult to determine whether that elbow was, in fact, steel or brass.

Consequently, I find in this case that the insured, the Plaintiff in this case, would have had no reason to suspect this defect, and I find it a very definite defect.

I would further find, as the trier of the fact, that this is corroborated by the fact that apparently it only took from early 1969 to September, 1969, for this accelerated wear and tear to cause this separation and to, in fact, cause this loss.

I do agree and would find, as the trier of the fact, that the plaintiff is well qualified in certain areas, has apparently had more than what I would term average experience. In addition to that, however, I would find that he apparently also exhibits more than average concern for the condition of his vessel, in particular, this vessel, the boat we are talking about, and as the trier of fact I

would find that he made probably more than reasonable inspections and I think he did more than reasonable maintenance, as has been brought out by the testimony of most, if not all, of the witnesses who were familiar with the condition of the boat before the loss occurred.

As an additional finding of fact, which I think is probably necessary in view of all of the testimony, and based upon the only testimony that has been presented, I would find that the plaintiff in this case was not guilty of negligence in creating this latent defect because apparently he believed, and with ample justification, that Miami Truck Refrigerating Company was at least reasonably well qualified to install air-conditioning equipment on boats.

The only testimony before me is that that company had done it on numerous occasions and was regularly engaged in the business of installing air-conditioning equipment on boats.

This was a question in my mind because it would appear to the Court that this could have possibly been a very legitimate defense if the insured in this case had been guilty of negligence in selecting someone who was unqualified, and that by virtue of their lack of qualifications they had used what apparently, according to all of the testimony, is a part that should not be used in such an installation. I think that might have given rise to a defense on the part of the carrier, but I would make an affirmative finding that such is not the case here; that from the only testimony in front of me, Miami Truck Refrigerating Company did possess or at least held themselves out as possessing the necessary qualifications for making such an installation.

MR. HARTWIG: Could it be possible, if the Court please, that you could make a finding as to the theory of estoppel, which was presented by the Plaintiff?

THE COURT: No, I am going to state in the record that the Court is not making any finding on the question of estoppel, and my reason for that is I do not feel it is necessary to go to that theory, which has been presented by the plaintiff, and I want the record to affirmatively show that I am making no finding either way on that because I don't believe in making unnecessary findings.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NUMBER 70-213-Civ-PF

MILLARD V. IRWIN, owner of the Yacht "Jomie"
Plaintiff

versus

EAGLE STAR INSURANCE COMPANY, LTD.,
Defendant.

(Filed May 13, 1971)

THIS CAUSE came on to be heard for Trial on Thursday, April 22, 1971 and Friday, April 23, 1971. Upon hearing testimony and having examined the evidence the Court finds and concludes:

FINDINGS OF FACT

1. This was an action on a marine insurance policy by the Plantiff as the insured against the Defendant as insuror for a loss sustained while the policy was in effect.

2. The loss sustained by Plaintiff was not covered under the named perils section of the insurance policy.

3. The cause of the sinking was caused by the use of a steel elbow in the fresh water intake of the ship's air conditioning system which created a latent defect in the machinery of the vessel, within the purview of the Inchmaree clause of the insurance policy.

4. The defect was of such a nature that the Plaintiff could not have been made aware of it until after the loss.

5. The Plaintiff did not know or did he have reason to be put on notice that the elbow was made of steel rather than brass as the elbow and adjacent fittings had been painted, a reasonable prudent boat owner such as Plaintiff could not have ascertained if the elbow was steel or brass.

6. At all times material the Plaintiff exhibited that he exercised more than the usual standard of care in the maintenance of the vessel, the loss has not resulted from want of due diligence on Plaintiff's part.

7. The Plaintiff acted as a reasonable prudent boat owner when he hired Miami Truck Refrigerator Company to install the air conditioning system as they professed to be qualified to install such a system. A reasonable well qualified installer would not have used the iron or steel elbow. The Plaintiff was not made aware, was not put on notice, or did he know of the steel elbow at any time prior to the loss.

8. The Plaintiff sustained damages totaling $37,038.98 as direct result of the sinking.

9. This Court has reserved making a find of fact as to the issue of waiver and estoppel due to the findings set forth above.

CONCLUSIONS OF LAW

10. The Court has jurisdiction of the subject matter, a claim on a marine insurance policy.

11. Plaintiff's loss of $37,038.98 was a claim insured against under the Inchmaree clause of the insurance policy issued by the Defendant.

Peter T. Fay
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NUMBER 70-213-Civ-PF

MILLARD V. IRWIN, owner of the Yacht "Jomie"
Plaintiff

versus

EAGLE STAR INSURANCE COMPANY, LTD.,
Defendant.

(Filed May 13, 1971)

THIS CAUSE came on to be heard for trial on Thursday, April 22, 1971 and Friday, April 23, 1971, and the Court having entered its Findings of Fact and Conclusions of Law, it is

ORDERED, ADJUDGED and DECREED that the Plaintiff, MILLARD V. IRWIN, shall receive from the Defendant, EAGLE STAR INSURANCE COMPANY, LTD., a sum of $37,039.98, and in addition thereto $205.92 for costs expended, for a total of $37,244.90 for all of which let execution issue.

DONE and ORDERED at Miami, Florida this 12th day of May, 1971.

Peter T. Fay
United States District Judge

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2348

MILLARD V. IRWIN, owner of the Yacht "JOMIE",
Plaintiff-Appellee,

versus

EAGLE STAR INSURANCE COMPANY, LTD.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

(February 29, 1972)

Before WISDOM, COLEMAN, and SIMPSON,
Circuit Judges.

COLEMAN, Circuit Judge: Did the marine insurance policy issued by Eagle Star Insurance Company, Ltd., cover the loss of the yacht "Jomie"? Upon a complaint filed in admiralty the District Court held for the insured. We reverse.

The circumstances of the loss are not disputed.

One afternoon the "Jomie" was tied up at the dock, with no premonition of impending disaster. During the night, while unoccupied, the yacht sank. A one inch iron nipple in the piping of the air conditioning system broke within approximately six months of its installation by an independent air conditioning firm. The iron nipple was joined to two brass fittings. It was usually submerged in the bilge water and was located directly beneath a hatch cover which was left open and observed by the owner as often as once a week when making inspections of the vessel. The fittings had been painted black and, in the absence of scraping, the type of metal of which the nipple was made would not be discerned in the course of a customary inspection.

The expert witnesses on both sides agreed that the sinking of the vessel was caused by the separation of the elbow pipe from the sea strainer in the water intake of the air conditioning system, allowing water to fill the vessel. The separation was caused by an electrolysis which, in turn, had been caused by *the union of steel with brass in the presence of air and salt water.*

The District Court specifically found as follows:

"(1). That the use of the steel elbow in the installation of this air conditioning system created a defect in the machinery of the vessel and that this defect was a latent defect within that definition included in the Latent Defect, Negligence, Risk On Shore, et cetera, clause of the policy;

"(2). It [steel to brass] is not a standard acceptable type of material to use in this elbow;

"(3). The insured was not aware of this condition, this latent defect, until after the loss had been

sustained, until after the part had separated and until after the boat had sunk;

"(4). The plaintiff not only did not know and was not aware of the different materials but had no reason to be aware of them, and acting as a reasonable person should not have been aware of them, since apparently the installer did paint the steel elbow when all of these parts were installed;

"(5). There is no conflict but what new parts were used when it was installed and that a reasonable person inspecting this area after such installation, in the words of even Captain Holland, who was an expert, could not have told from such an inspection or it would have been very, very difficult to determine whether that elbow was, in fact, steel or brass;

"(6) The insured would have no reason to suspect this defect, and I find it a very definite defect;

"(7). That this is corroborated by the fact that apparently it only took from early 1969 to September, 1969, for this accelerated wear and tear to cause this separation and to, in fact, cause this loss."

The insurance policy by its Inchmaree clause covered "any latent defect in the machinery or hull".

The decisive issue on appeal is whether the condition hereinabove described was a latent defect within the terms of the policy. Eagle Star says that it was not and declined to pay the loss. This suit followed.

A hundred years ago, the Supreme Court, in a thoroughly exhaustive opinion authored by Mr. Justice Bradley, held that a contract of marine insurance is a maritime contract, within the admiralty and maritime jurisdiction, though not within the exclusive jurisdiction of

the United States Courts, *Insurance Company* v. *Dunham*, 78 U.S. (11 Wall.) 1 (1870), 20 L.Ed. 90. In *Kossick* v. *United Fruit Company*,[1] the Supreme Court repeated that a contract to insure a ship is maritime. That, however, does not determine whether the interpretation and application of the policy terms are to be governed by state or maritime law.

Wilburn Boat Company v. *Fireman's Fund Insurance Company*[2] was commenced in a Texas state court by the insured against an insurer for fire loss to a vessel covered by a full marine risk insurance policy. The case was removed to the United States District Court for the Eastern District of Texas on diversity grounds. At the time of the loss the boat was located on Lake Texoma, a small artificial inland lake between Texas and Oklahoma. The district court found for the insurer. This Court upon appeal, 201 F.2d 833 (1953) affirmed on the theory that the insured had breached the policy warranty as to private use and was therefore barred from recovery under general maritime law, from which maritime policies are derived. We held that a cause of action on a marine policy was a cause of action in admiralty, unchanged in substance when asserted in a court of law. The insured argued in the lower courts that a Texas Statute (prohibiting a forfeiture under the circumstances present and thereby rendering the warranty in the policy unenforceable) should govern the lawsuit. That argument was rejected by the district court and by this Court. The Supreme Court granted certiorari and reversed, holding that in the absence of federal legislation or a conflicting rule of law judicially established by the federal courts, the Supreme Court would leave regulation

1. 365 U.S. 731, 735 (1961), 81 S.Ct. 886, 6 L.Ed.2d 56.
2. 348 U.S. 310 (1955), 75 S.Ct. 368, 99 L.Ed. 337.

of marine insurance to the states and would apply the Texas statute to a case involving a Texas marine policy.

In the subsequent *Kossick, supra*, decision, the Supreme Court partially retreated from its holding in *Wilburn Boat*. *Kossick* was a diversity action brought on an alleged oral agreement by a shipowner to assume responsibility for all the consequences of improper or inadequate treatment of the plaintiff-seaman at a Public Health Service hospital in consideration for the seaman's foregoing private treatment. The district court dismissed the complaint before trial on the basis of New York's statute of frauds and the Court of Appeals for the Second Circuit affirmed. The Supreme Court granted certiorari and reversed the judgment of the two lower courts. In holding that the alleged oral contract should be governed by the federal decisional maritime law, the Court, writing through Mr. Justice Harlan, noted the following considerations: the claimed oral agreement might well have been made anywhere in the world; it was desirable that the validity of such an agreement be judged by the same law wherever made; application of New York's law would invalidate the contract; and New York's interest in not lending her courts to the accomplishment of fraud was not sufficient to overcome the countervailing factors in the maritime field. Mr. Justice Harlan's opinion addressed itself to the *Wilburn Boat* decision by observing that "the application of state law in that case was justified by the Court on the basis of a lack of any provision of maritime law governing the matter there presented", 365 U.S. at 742. Finally, Mr. Justice Harlan noted that several commentators had suggested that *Wilburn Boat's* deference to Texas law might be explained by the location of the boat on a small artificial lake between Texas and Oklahoma at the time of the fire.

Despite the language in *Kossick* tending to limit the *Wilburn Boat* opinion to its facts, we believe that *Kossick* did an incomplete job of burying the *Wilburn Boat* obeisance to state contract law in certain cases involving marine contracts. The *Kossick* opinion emphasized that the alleged oral contract was "essentially maritime" and that such contracts between seamen and shippers could be made "anywhere in the world" involving seamen of many nationalities and many ports of call. In addition, the Supreme Court observed that the alleged oral contract was of no concern to the State of New York except with regard to the solitary interest of protecting its courts from the assertion of fraudulent contractual claims.

After weighing the circumstances of this case in the light of the factors controlling the decision in *Kossick, supra*, we conclude that Florida law should be applied. Unlike the oral contract in *Kossick*, the insurance contract before us in this case is one in which Florida has substantial and legitimate interest. The plaintiff is a Florida resident and the yacht "Jomie" was anchored in Florida waters when she sank. The marine insurance contract was brokered in Florida and the defendant-appellant insurance company is authorized to do business in that state. The plaintiff is no itinerant seaman of the class traditionally protected by the federal maritime jurisprudence.

Having determined that the Florida decisional law should be applied in this case, we believe ourselves bound by the decision of the Fourth District Court of Appeal in the case of *Egan* v. *Washington General Insurance Corporation*, 1970, 240 So.2d 875, which presented a factual situation remarkably similar to the one in this case. The yacht "Blue Heaven" sank at the dock because of a defect in its sea strainer assembly, caused by the corrosion of a bolt which should have been of a different type metal. The

"Blue Heaven" was covered by the same Inchmaree clause which is present in our case. The Florida court held that since there was no defect in the bolt, as a bolt, but only in the method by which it was used, there was no latent defect and hence no coverage under the policy. Because the Egan case is not meaningfully distinguishable from the one now before us, we conclude that the insurer must prevail.

The judgment of the district court is reversed and the cause is remanded with directions to dismiss the complaint.

REVERSED.

APPENDIX E

UNITED STATES COURT OF APPEALS
Fifth Circuit

Office of the Clerk
April 13, 1972

Edward W. Wadsworth
Clerk
Room 408-400 Royal St.
New Orleans, La. 70130
(504) 527-6514

TO ALL PARTIES LISTED BELOW

Re: No. 71-2348—Millard V. Irwin, owner of the Yacht "Jomie", vs. Eagle Star Insurance Company, Ltd.

Gentleman:

You are hereby advised that the Court has today entered an order denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection

therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth,
Clerk
/s/ Alvis M. Winchester
Deputy Clerk

/amw

cc: Messrs. Gerald M. Walsh
James V. Dolan
Mr. G. E. Hartwig

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-2348

D. C. Docket No. 70-213-PF

MILLARD V. IRWIN, owner of the Yacht "JOMIE",
Plaintiff-Appellee,

versus

EAGLE STAR INSURANCE COMPANY, LTD.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

(Filed April 24, 1972)

Before WISDOM, COLEMAN and SIMPSON,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions to dismiss the complaint;

It is further ordered that plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

February 29, 1972

Issued As Mandate: Apr 21 1972

COPY

71-1693

Supreme Court, U. S.
FILED
JUL 1 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

MILLARD V. IRWIN, Owner of the Yacht, "JOMIE",
Petitioner,

versus

EAGLE STAR INSURANCE COMPANY, LTD.,
Respondent.

BRIEF OF RESPONDENT EAGLE STAR INSURANCE COMPANY, LTD. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WALSH, DOLAN & KRUPNICK, P. A.
Attorneys for Respondent
402 Court House Square Building
Fort Lauderdale, Florida

Counsel of Record:
GERALD M. WALSH
402 Court House Square Building
Fort Lauderdale, Florida

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No.

MILLARD V. IRWIN, Owner of the Yacht, "JOMIE",
Petitioner,

versus

EAGLE STAR INSURANCE COMPANY, LTD.,
Respondent.

BRIEF OF RESPONDENT EAGLE STAR INSURANCE COMPANY, LTD. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Petitioner attempts to invoke the jurisdiction of this Court under 28 U.S.C. 1254 (1). The jurisdiction of this Court is questioned since the Petitioner has failed to meet the requirements of Rule 19 of the Supreme Court Rules. The Petitioner has failed to show whether the Court of Appeals in this case has rendered a decision in conflict with the decision of another Court of Appeals on the same matter, has decided a point in question in Federal law which has not been, but should be settled by this Court, or has decided a Federal question in a way in conflict with the applicable decisions of this Court. These were the grounds for jurisdiction set

forth by the Petitioner and he has failed to meet or set forth statutory or case law demonstrating those conflicts.

QUESTIONS PRESENTED

I. Whether this Court should review the decision of the Court of Appeals which considered the decisions of this Court in deciding to apply Florida decisional law under the particular circumstances of this case?

II. Whether this Court should review the decision of the Court of Appeals in light of the fact that the interpretation of the Inchmaree Clause of marine insurance policies has almost uniform interpretation in both the Federal and State courts?

III. Whether this Court should review the decision of the Court of Appeals which reversed the decision of the District Court and remanded the case with directions to dismiss the Complaint when no issues were reserved by the District Court nor were any further issues raised on appeal by the Petitioner?

STATEMENT OF THE CASE

Petitioner, MILLARD V. IRWIN, brings this Petition for Writ of Certiorari to review the judgment and

opinion of the United States Court of Appeals for the Fifth Circuit. That Court, after reviewing the facts and issues of this case and the particular circumstances involved, reversed the judgment of the District Court which had held that the separation of an elbow from the strainer in the water intake system of an air conditioning system caused by deterioration and corrosion due to electrolysis constituted a latent defect, and therefore was within the provisions of the marine insurance policy. The Appellate Court, basing its decision upon a Florida case almost on all fours, held that this condition did not constitute a latent defect.

During the trial of this case, an expert for both parties testified that the cause of the sinking of the vessel was due to the separation of a nipple and/or elbow from the strainer in the water intake of the air conditioning system allowing water to enter the vessel. The separation was caused by deterioration and corrosion of the threading of the steel elbow which had been exposed to a process called electrolysis. The strainer was made of brass while the elbow was made of steel and the combination of these two metals when combined with air and salt water resulted in electrolysis and/or corrosion. The strainer and elbow in question were located at the forward part of the vessel approximately seven to ten inches above the skin of the ship. They were directly below a hatch that is three to three and one-half feet square and approximately three feet above the strainer unit. The trial court ruled that the loss was caused by the use of a steel elbow in the installation of the air conditioning system creating a defect in the machinery of the vessel and that this

defect was a latent defect within the definition included in the latent defect, negligence, risk on shore, etc., clause of the policy. The Court of Appeals reversed and held that the damage was not caused by a latent defect. The Appellate Court did not base their decision on the principle that the trial court's decision was erroneously based on Federal decisional law, but rather that after considering the factors set forth in the *Wilburn* and *Kossick* cases and after weighing the circumstances of the case at hand, they felt that Florida decisional law should be applied especially since the *Egan* case presented a factual situation remarkably similar to the one in this case. The Court nowhere impliedly agreed, as suggested by the Petitioner, that this Florida ruling conflicts with federal interpretations by its own Court on the same issue. In fact, as will be seen in later argument, the principles as set forth in the *Egan* case are consistent with Federal decisional law on the issue of latent defect and the Inchmaree Clause.

REASONS FOR DENYING THE WRIT

A. The Court Of Appeals Was Correct In Deciding To Apply Florida Decisional Law Under The Particular Circumstances Of The Case.

There is nothing express or implied in the decision of the Appellate Court that concedes that the Petitioner would have been entitled to recover under Federal decisional law had it not applied Florida law to this case. The decision of the Appellate Court did say that in

Kossick v. United Fruit Company, 365 U.S. 731, (1961), that the Supreme Court stated that a contract of marine insurance was a maritime contract, but that of itself does not determine whether the interpretation and application of the policy terms are to be governed by state or maritime law. The Appellate Court made clear that "after weighing the circumstances of this case in the light of the factors controlling the decision in *Kossick, supra*, we conclude that Florida law should be applied. Unlike the oral contract in *Kossick*, the insurance contract before us in this case is one in which Florida has substantial and legitimate interest. The Plaintiff is a Florida resident and the yacht, "Jomie" was anchored in Florida waters when she sank. The marine insurance contract was brokered in Florida and the defendant-appellant insurance company is authorized to do business in that state. The Plaintiff is no itinerate seaman of the class traditionally protected by the Federal Maritime Jurisprudence."

The Appellate Court was correct in applying Florida decisional law in this case due to the almost complete similarity in the circumstances involved in both the case of *Egan v. Washington General Insurance Corp.*, 240 So.2d 875 (4 DCA 1970) and that of the case at hand. In *Wilburn Boat Company v. Fireman's Fund Insurance Company*, 348 U.S. 310 (1955), the court stated that "since the insurance policy here sued on is a maritime contract the Admiralty Clause of the Constitution brings it within federal jurisdiction." But the court goes on to state that "it does not follow, as the courts below seem to think, that every term in every maritime contract can only be controlled by some fed-

erally defined admiralty rule. In the field of maritime contracts as in that of maritime torts, the National Government has left much regulatory power in the States." The Court also cites the historical significance of the marine insurance industry's regulation by the states and the federal government's tendency to acquiesce in that trend. In fact, the court stated that "We, like Congress, leave the regulation of the marine insurance where it has been — with the States." In the concurring opinion, Justice Frankfurter stated that "our problem is whether this situation — involving a marine policy such as is the basis of litigation — calls for a uniform rule throughout the country applicable to breaches of warranty of all similar marine insurance contracts." This particular issue has been raised by the Petitioner in his brief with regard to the interpretation and application of the Inchmaree Clause of marine hull insurance policies. Justice Frankfurter stressed in his concurring opinion that there are times when uniformity of application of law revocable to various policies overrides the historical trend toward state regulation. "Is it to be assumed that were the Queen Mary, on a world pleasure cruise, to touch at New York City, New Orleans and Galveston, a Lloyds policy covering the voyage would be subjected to the varying insurance laws of New York, Louisiana and Texas?" Judge Frankfurter goes on to say that "the business of marine insurance often may be so related to the success of many manifestations of commercial maritime endeavor as to demand application of a uniform rule of law designed to eliminate vagaries of state law and to keep harmony with the marine insurance laws of other great maritime powers." This would seem

to be the reasoning of the Fifth Circuit Court of Appeals in the *Sea Pak* case when not only was the ship not docked in Florida, but was operating in the Bahamas area on a fishing expedition and only returned to the Florida coast on occasions for repair. *Tropical Marine Products v. Birmingham Fire etc.*, 247 F.2d 116 (5th Cir. 1957). But Justice Frankfurter goes on to say in the *Wilburn* case, *supra*, "As it is true of other maritime interests, however, the demand for uniformity is not inflexible and does not preclude the balancing of the competing claims of state, national and international interests. . . In rejecting abdication of all responsibility by this court for uniformities in marine insurance and its complete surrender to the States, one is not required to embrace another absolute, complete absorption by this court in the field of marine insurance and the entire exclusion of the States."

The decision of the Appellate Court in the case at hand firmly rests upon principles not only set forth in the majority opinion but further exemplifies the principles as set forth in the concurring opinion by Justice Frankfurter. This line of reasoning was followed in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959). In that case the court stated that "Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article III evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the State and the National government in the regulation of maritime

commerce. It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the states a wide scope. . . State rules for the petition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of a warranty under contracts of marine insurance — all these laws and others have been accepted as rules of decision in admiralty cases, even at times, when they conflicted with the rule of maritime law which did not require uniformity. . . The state and federal governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history. This sharing of competence in one respect of our federalism has been traditionally embodied in the savings clause of the Act of 1789." There is nothing cited in *Wilburn* that should lead the Petitioner to believe that the case was intended to be narrowly applied to statutory regulation of insurance companies dealing with the public. In fact, the Court in *Wilburn* stated that "the vast amount of insurance litigation in State courts throughout our history also bears witness that until recently state legislators in state courts have treated marine insurance as controlled by state law to the same extent as all other insurance." There is nothing here to indicate that the Court considered that their decision was limited to statutory regulation.

In the *Kossick* case, *supra*, the Court was faced with the question of the propriety of a dismissal before trial of a cause of action in a seaman's diversity complaint,

said dismissal being based on the grounds that the allegations of the complaint were deficient by reasons of the New York Statute of Frauds. The Court stated that the case was brought before the Court because it presented novel questions as to the interplay of state and maritime law in that there was an established rule that oral contracts are generally regarded as valid by maritime law. The two questions before the Court were (1) whether the alleged contract was a maritime contract and (2) if so, was it nevertheless of such a local nature that its validity should be judged by state law. The Appellate Court had held that the contract sued upon was not a maritime contract since it was merely a promise to pay money, on land, if the former seaman should suffer injury at the hands of the United States Public Health Service Personnel, on land, in the course of medical treatment. The court held that this was too narrow a view in that the consideration for the promise was a good forbearance to press what he considered the full extent of his maritime right to maintenance and care. The court stated that "so viewed, we think that the alleged agreement was sufficiently related to *peculiarly* maritime concerns as not to put it, without more, beyond the pale of admiralty law." It is that particular portion of the decision that distinguishes this case from the case at hand. Here we are dealing with the peculiarly maritime right of a seaman, i.e. maintenance and care, which has been historically provided for and governed by federal maritime law. The court went on to say that "considering that sailors of any nationality may join in a ship in any port, and that it is the clear duty of the ship to put into the first available port if this be necessary

to provide prompt and adequate maintenance and care to a seaman who falls ill during the voyage, it seems to us that this is such a contract as may well have been made anywhere in the world, and that the validity should be judged by one law wherever it is made. On the other hand we are hard put to perceive how this contract was *peculiarly a matter of state and local concern.*" This case is easily distinguished from the *Wilburn* case in that historically the area of maintenance and care has been controlled by federal legislation and decisions of Federal courts. However, as pointed out in *Wilburn,* marine insurance has been historically governed by the states. Here we have an individual who is putting into various ports around the country and requesting entrance into a federal institution, a Public Health Service Hospital, and not an individual who is making application for an insurance policy regulated by the state, through a broker in the state where the boat is docked for personal use. This case is certainly not in conflict with the *Wilburn* case as the court in *Kossick, supra,* stated "the application of state law in that case *(Wilburn)* was justified by the court on the basis of a lack of any provision of maritime law governing *the matter there presented.*" There was in the *Kossick* case, *supra,* a strong dissenting opinion by Justice Frankfurter. He stated that "the notion that if such a limited and essential local transaction as the contract here in issue were allowed to be governed by local statute of frauds it would disturb uniformity of maritime law is, I respectfully submit, too abstract and doctrinaire a view of the true demands of maritime law." The Appellate

Court in the case at hand has correctly followed the principles set forth in the *Wilburn* opinion.

In *Gulfstream Cargo Ltd. v. Reliance Insurance Company,* 409 F.2d 974 (5th Cir. 1969), the Court had no trouble in following the guidelines set forth under *Wilburn.* The following cases indicate that the various circuits have continued to follow guidelines set forth in *Wilburn* and that there is no conflict existing between them: *Purofied Down Products Corp. v. Travelers Fire Insurance Co.,* 278 F.2d 439 (2nd Cir., 1960); *A/SJ Ludwig etc. v. Commercial Stevedoring Co.,* 256 F.2d 227 (2nd Cir. 1958); *Grow v. Steel Gas Screw etc.,* 310 F.2d 547 (6th Cir. 1962); *Bell v. Tug Shrike,* 332 F.2d 330 (4th Cir. 1964).

In the *Purofied Down Products,* case, *supra,* the Court stated in footnote one that "We read Wilburn Boat Co. (case) . . . to require us to apply state law in the area of marine insurance unless there is a well-established federal admiralty rule which governs the *particular* problem before the Court." This reasoning hits the nail on the head. The Appellate Court correctly applied the case of *Egan v. Washington General Insurance Corp., supra,* because there was no well-established federal admiralty rule dealing with this particular problem, i.e. corrosion, joinder of dissimilar metals, and therefore they applied Florida decisional law which was right on point.

Yet the Petition suggests that the Fifth Circuit in this case overlooked the decision of *(The Sea Pak), Tropical Marine Products v. Birmingham Fire Insur-*

ance Co., 247 F.2d 116 (5th Cir. 1957) and *(The West Kyska), Waterman SS Corp. v. U.S. Smelting, etc.*, 155 F.2d 687 (5th Cir. 1946) *cert denied*, 329 U.S. 761 (1946). In the *Sea Pak* case the Court found that there was "no explanation as to what caused the leak which resulted in the loss of the vessel." The Court applied the presumption that the defect must have been latent since it was not discoverable prior to departure for sea. This is certainly not a case which is in any way similar to the circumstances of the case at hand. Furthermore, in the *West Kyska* case, *supra*, the Court held that the owner of the ship had failed to establish a latent defect. In fact, the Court stated that a "true latent defect is a flaw in the metal and is not caused by the use of the metallic object." A similar holding can be found in *Mattson v. Connecticut Fire Insurance Co.*, 80 F. Supp. 101 (D. Minn. 1948). Again these are not similar circumstances to the case at hand and the Court of Appeals did not vary from the general principles set forth in both the *Sea Pak* case and the *West Kyska* case. Though these cases provide some guidelines as to the interpretation of the term "latent defect", they certainly are not on point and the Court of Appeals therefore correctly applied the *Egan* case which dealt with almost identical circumstances.

B. The Inchmaree Clause Of Marine Insurance Policies Has Not Been Subjected To Varying Interpretations Especially Under Federal And Florida Case Law.

There is little conflict in the minds of both parties as to what caused the damage to the vessel, i.e. the

separation of the steel elbow from the brass strainer allowing water to enter the hull. Further, there is little disagreement as to the cause of the separation, that being corrosion of the steel elbow causing it to separate from the brass strainer. Experts for both parties agree that this corrosion was caused by the joining of dissimilar metals in the presence of air and salt water resulting in a process called electrolysis and/or corrosion of the steel elbow. The Appellate Court has found that this did not constitute a latent defect and their decision is in accordance not only with Florida decisional law as cited in their decision, but is also supported by Federal cases throughout the various Circuits. The statement by the Petitioner that the insured probably would have gotten a more satisfactory result in another jurisdiction is not supported by statute or by decisions both in the Federal Courts and the Courts of Florida.

It is agreed that both Florida and Federal cases appear to be uniform in holding that the test to determine latency is the ability to discover the defect by reasonable, prudent, and customary inspections. However, the term "latent" refers to specific type of defects and not all defects which go undiscovered. The Petitioner has cited the case of *Tropical Marine Products v. Birmingham Fire Insurance Company, (Sea Pak), supra*, as providing a definition of the term "latent defect." The Court in that case cited various definitions of latent defect and included the definition from *Ferrante v. Detroit Fire and Marine Insurance Co.*, 125 F. Supp. 621 (S.D. Cal. 1954) which stated "a latent defect is a hidden defect and generally involves the

material out of which the thing is constructed as distinguished from the results of wear and tear." In the *Ernest Construction Co. v. The Tug Commodore*, 294 F. Supp. 15 (S.D. Ala. 1968), the cause of the loss was a leak in an oil line hidden under a fixed cuppling. The court held in this case that something more than mere failure must be shown to establish a latent defect. In *The Bill*, 145 F.2d 70 (4th Cir. 1944), the Court stated that the defect in the bilge pipe was not due to any flaw in the metal, but was due to the corrosive effect of foreign substances resulting from the use of the ship. The Court held this was not a latent defect. The case of *Saskatchewan Gov't Ins. Office v. Spot Pack, Inc.*, 242 F. 2d 385 (5th Cir. 1957) had nothing to do with latent defects and the Court was mainly concerned with the defense of "want of due diligence."

The Petitioner finds the case of *The Esso Manhattan*, 1953 AMC 1152 (S.D.N.Y.) analogous to this case. This case is easily distinguishable in that the defective welding in the deck plate was a defect in the material itself or process itself and not, as in the case at hand, a result of wear and tear and other outside forces such as electrolysis.

The Petitioner has also cited the case of *Larson v. Insurance Company of North America*, 362 F.2d 261 (9th Cir. 1966), affirming the District Court decision at 252 F. Supp. 458 (W.D. Wash. 1965), in which case a loss resulted from the sea suction pipe which broke by gradual action of sea water, electrolysis and corrosion. The District Court stated with regard to a latent defect that previous decisions, "have confined the term

to a defect inherent in the metal itself or in the original basic material of which the part concerned is defective and latent in the sense that the defect is not one which could be discoverable by any feasible test, even with the exercise of due diligence. An example, of course, would be a basic weakness in the portion of the steel of the hull; or presumably, in a wooden vessel, in the lumber of the hull, as distinguished from a weakness which did not exist originally in the metal from which the vessel or part was constructed, but which became weakened by chemical and/or electrolytic action or other wear and tear. . . There is no evidence available or offered which would show that the breaking off of the suction pipe was due to any sudden action of wind and/or wave which caused it suddenly to collapse from any unusual strain imposed on a part weak from any inherent or other defect in the metal, but rather the only evidence expected to be adduced would indicate that the weakness in the pipe was caused by gradual action of the sea water, electrolysis, galvanic action of corrosion over a substantial period of time — from *several months* to several years — similar to other processes of wear and tear." That case, cited by the Petitioner, emphasizes the fact that a latent defect involves the material itself and not the joinder of materials resulting in electrolytic action and wear and tear.

The case from Louisiana cited by the Petitioner, *National Sugar Refining Co. v. The Motorship Las Villas*, 225 F. Supp. 686, (E.D. La. 1964), involved a part bilge suction valve which was defective when turned off, allowing water to flow from the sea through the valve

and into the bilge. The reason for the defect was that the valve stem, stopper, and guide had been improperly fitted. This Court found that this condition constituted a latent defect and rightly so. Here we have an inherent defect in the product itself which led to the loss. We do not have a loss caused by the effect of outside forces upon the product which we do have in the case at hand. This factor distinguishes this case and emphasizes once again the correctness of the reasoning of the Court of Appeals in following the *Egan* case, *supra*.

The Petitioner suggests that even the Florida cases are in conflict. The case of *Continental Insurance Company v. Levinson*, 224 So.2d 445 (3 DCA Fla 1969) involved the sinking of the insured's vessel while moored at its dockage. The insured predicated his cause of action upon the Inchmaree Clause and his theory was that the particular latent defect which caused the boat to sink was a defective exhaust hose in the six month old vessel which had broken allowing water to fill and sink the ship. This defect was a breaking of the hose, not a joinder of metals or a result of wear and tear. The Petitioner contends that this case is in direct conflict with the case of *Egan v. Washington General Insurance Corp.*, 240 So.2d 875 (4 DCA Fla 1970). These two cases can certainly be distinguished as the Levinson case involved the breaking of an exhaust hose within a short period of time and involved only the material of the hose itself. The *Egan* case involved a thru bolt in the sea strainer that corroded over a ten month period causing the sea strainer to malfunction resulting in the sinking of the vessel. The latter case is ex-

actly the situation we have in the case at hand and a defect under those circumstances has not been defined as a latent defect by either the Florida courts or the federal courts. The case at hand and the *Egan* case, involved, not failures in the material itself, but rather a failure due to wear and tear through the electrolytic process. However, the *Levinson* case involved the defect in the material itself which is the classical latent defect theory.

In *Reliance Insurance Co. v. Brickenkamp*, 147 So.2d 200 (2 DCA Fla 1962), the court found that the rubber hoses between the exhaust elbows and the pipes going out of the transom were burned in half allowing water to enter the hull. The court found that the holes in the rubber hoses caused by loss of cooling water circulation to the engine resulted from a water pump failue which in turn resulted from a dry belt slipping. The dry belt was found to have slipped because of the maladjustment of the generator which draws the belt tight over the water pump. The question before the court in this case was whether the cause of the loss was a latent defect in machinery or hull which is the same situation presented to this Court. The Court cited the *Waterman* case, *supra*, where the Court had held that a true defect is not a gradual deterioration but is a defect in the metal. The Court held in this case that the defect was not latent.

In the *Egan* case, the yacht sank at dock because of the default in the sea strainer assembly caused by corrosion of a bolt which should have been of a different type material. Furthermore, the only de-

fect mentioned by the surveyor was that it did not have the ability to risk corrosion and rust under these particular circumstances. The Court stated that based upon that testimony, it appeared that the main thrust of the Plaintiff's argument turned on the proposition that the bolt in question consituted a latent defect because it corroded more quickly than would a bolt composed of different alloy. The Court stated that with that proposition they could not agree. The Court specifically stated that "latent defects refer to some structural weakness in the part or component which is responsible for the damage." The Appellate Court in the case at hand has correctly applied the principles and the findings of the *Egan* case to the case at hand in finding that this was not a latent defect. Based upon a review of the federal decisions as well as the law of the State of Florida, there appear to be uniform interpretations in the area of marine insurance contracts throughout the country.

C. The Court Of Appeals Was Correct In Remanding This Case With Directions To Dismiss The Complaint Since There Were No Issues Reserved By The District Court Nor Were There Any Other Issues Raised By The Petitioner On Appeal.

Subsequent to the entry of that final judgment which was filed on May 13, 1971, no motion was made by the Appellant pursuant to Rule 52(b) of the Federal Rules of Civil Procedure to amend the findings of the Court or make additional findings and amend the judgment accordingly. Nor was there a Notice of Appeal or Cross

Appeal filed by the Petitioner pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure (28 USCA) within the time limit provided from the date of filing of the Final Judgment or from the date of the filing of the Notice of Appeal by the Appellant, Respondent herein. By failing to file a Motion for Additional Findings or a Notice of Appeal, the Petitioner failed to timely raise the issue of estoppel for consideration by the Appellate Court. Petitioner even cites 28 U.S.C. Sec. 2106 which states:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court *lawfully brought before it for review*, and may remand the cause and direct the entry of such approach judgment, decree, or order or require such further proceedings to be had as may be just under the circumstances."

Yet neither the issue of estoppel nor the issue of the court's failure to make any finding with regard to the issue of estoppel was brought before the Court of Appeals for review. The Appellate Court, after reversing the decision of the Trial Court with regard to the issue of latent defect, correctly remanded the case to the District Court with instructions to dismiss the Complaint because that was the only issue preserved in the record on appeal.

The Petitioner did mention in his brief to the Appellate Court the issue of estoppel, but the Petitioner

did not raise this issue on appeal. The only issues before the Appellate Court were the determination of whether the loss was caused by a latent defect and whether the loss resulted from want of due diligence by the owner. Upon receipt of Petitioner's brief in the Appellate Court, the Respondent filed a motion to strike that portion of his brief dealing with the issue of estoppel.

In the case of *Wallace v. Fisk, et al.*, 115 F.2d 1003 (8th Cir. 1940), *cert. denied*, 314 U.S. 710, *rehearing denied*, 315 U.S. 829, the issue before the Court was whether the granting of a Motion to Dismiss was proper under the Rules of Federal Procedure. In this case, Judgment was entered on March 30, 1940 and the Notice of Appeal therefrom was not filed until July 29, 1940, after more than the statutory ninety days having lapsed. (90 days was the statutory time limit). Although the Plaintiff in this case had filed a motion to amend the conclusions of law and the judgment in his favor, the Court stated that this did not operate to retain the case and jurisdiction of the District Court to extend the time for appeal to the Plaintiff. This, of course, is not applicable in the case at hand. But the court went on to say that "after the judgment Defendants had appealed, he (the Plaintiff) had the right to cross appeal or to file his motion (within time) in the trial court and within time limited by statute for appeal from the judgment apply to this court to remand the case for consideration of his motion to modify." Most importantly, the court stated that "the difficulty here is that the trial court had, by the taking

of the appeal, lost jurisdiction to consider and determine the motion before the motion was filed."

The above case points out clearly that the time limits as set forth in the Federal Rules of Civil Procedure and the Appellate Rules of Civil Procedure must be met by the various parties and that the issues must be presented on appeal. The Petitioner argues that "procedural guidelines seem to be confusing when the trial judge reserves rulings in non-jury trials as to the requirement that all issues be determined, and this technical matter apparently should be clarified." Nowhere in the transcript and the findings of the court did the court make any statement that it was reserving any ruling or judgment. I quote court as follows: "No, I am going to state in the record that the court is not making any finding on the question of estoppel, and my reason for that is I do not feel it is necessary to go to that theory, which has been presented by the plaintiff, and I want the record to affirmatively show that I am making no finding either way on that because I don't believe in making unnecessary findings." (P. 4 of Appendix A of Petitioner's brief). Nowhere in that statement of the Court is there any reservation by the Court with regard to the issue of estoppel. In fact, an appeal from a final order of the District Court terminates the District Court's jurisdiction to making findings of facts and conclusions of law required by Rule 52. *Aluminum Co. of America,* 2 FDR 224 (D.C. New York 1941)

Contrary to the Petitioner's brief, the Federal Rules and the Appellate Rules are crystal clear as to the

procedures that must be followed with regard to the various motions that were available to the Petitioner under Rule 52 of the Federal Rules of Civil Procedure and Rules 3 and 4 of the Federal Appellate Rules. By not pursuing his relief under those rules, the Petitioner chose to rely on the Trial Court's final judgment in his favor based solely upon the issues of latent defect and failure to use due diligence. The Appellate Court therefore had no jurisdiction to remand the case for further findings.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WALSH, DOLAN &
KRUPNICK, P.A.
Attorneys for Respondent
402 Court House Square
Building
Fort Lauderdale, Florida

GERALD M. WALSH

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a copy of the foregoing Brief of Respondent was furnished, by mail, to G. E. HARTWIG, Attorney for Petitioner, 220 Southeast 12th Street, Fort Lauderdale, Florida, and to ARTHUR ROTH and CHARLOTTE J. BARKAN ROTH, Attorneys for Petitioner, 1111 Ainsley Building, 14 Northeast 1st Avenue, Miami, Florida, this ____ day of ____, 1972.

GERALD M. WALSH

E COPY

Supreme Court, U. S.
FILED
JUL 27 1972
EUGENE ROMEO, JR. CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1693

MILLARD V. IRWIN, Owner of the Yacht, "JOMIE",
Petitioner,

vs.

EAGLE STAR INSURANCE COMPANY, LTD.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

G. E. HARTWIG
220 S.E. 12th Street
Fort Lauderdale, Florida
33316

ARTHUR ROTH and
CHARLOTTE J. BARKAN ROTH
1111 Ainsley Building
14 N.E. First Avenue
Miami, Florida 33132

Attorneys for Petitioner

R. L. MERRIWEATHER, INC., 916 Cherry Street, Kansas City, Mo. 64106, 421-2020

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PETITIONER'S REPLY BRIEF

I. The Issue of Uniform Application of Marine Insurance Policy

Respondent's brief demonstrates as clearly as the Petition the need for clarification of the law by this Court to establish guidelines for interpretation of Marine insurance policies and resolve the conflicts currently plaguing the maritime industries growing out of varying applications of this Court's opinion in *Wilburn Boat Co.* v. *Fireman's Fund Insurance Co.*, 348 U.S. 310 (1955).

We first discuss Respondent's contention that the Fifth Circuit held that Federal application of coverage for

latent defects under the Inchmaree clause is similar to that adopted by the Fourth District Court of Appeal in Florida in, *Egan* v. *Washington General Insurance Corp.*, 240 So. 2d 875 (Fla. App. 1970). If this were so, then the holding below would seem to be superfluous and pointless. However, in a lengthy opinion, the Fifth Circuit analyzed this Court's opinions in the several cases in order to conclude:

> "Having determined that the Florida decisional law should be applied to this case, we believe ourselves bound by the decision of the Fourth District Court of Appeal in *Egan* v. *Washington Insurance Corporation*, 1970, 240 So. 2d 875 * * *" (A. 12).

Respondent's brief does not meet the issue of how the Bench and the Bar are to apply this mandate to the various clauses of marine insurance policies in the many cases that arise in the Fifth Circuit's geographical area encompassing as it does the longest coastline, the most ports, and probably the largest volume of commercial shipping and pleasure boating of any Circuit. Since the holding is now binding in all of the districts of the Fifth Circuit, the scope of the opinion reaches far beyond the simple result in this case.

For instance, Louisiana must now re-examine its rule since that State concedes that its interpretation of the Inchmaree coverage differs from Federal maritime interpretation. *Anders* v. *Poland*, 181 So. 2d 879 (La. App. 1966), in which the court held it was required to follow Federal maritime law interpreting the Inchmaree Clause rather than its own narrower interpretation of latent defects from, *Schon* v. *James*, 28 So. 2d 531 (La. App. 1946).

Assuming that in Florida, as Respondent contends, there is no distinction between Federal maritime and State

application of the Inchmaree clause, this does not resolve the mandate to Bench Bar that marine insurance policies shall be interpreted by the decisional law of the various states or still the mischief inherent in such a holding, readily predicted by Gilmore & Black, Law of Admiralty.

The Fifth Circuit has applied *Wilburn Boat* to restrict coverage, exactly opposite to this Court's intended broadening of insurance protection to spread the burden of loss, by resorting to Florida Law to take away coverage, where Federal Law would, and did, allow it.

Respondent further misconstrues the petition in failing to meet the very point that in *Wilburn Boat*, this Court determined that the states may regulate marine insurance by statute, but only if such statute does not conflict with clear Federal decisional law, or if it is utilized it should be used only to provide coverage for a loss where a harsh application of Federal decisional law would deny coverage.

However, the Fifth Circuit has now extended the holding of *Wilburn Boat* to state decisional law, even when Federal general maritime law is available, and Respondent does not indicate how this extension and its probable application in 50 different ways can be resolved without this Court's intercession.

In the Petition at page 9, Petitioner omitted citation of the opinion of the Florida Third District Court of Appeal which follows the holding of that court *in Continental Ins. Co.* v. *Levinson*, 224 So. 2d 445 (Fla. App. 1969). The omitted citation is, *Lloyds of London* v. *Florida Longhorn, Inc.*, 230 So. 2d 725 (Fla. App. 1970).

As stated in the petition, the Third District Court of Appeal of Florida does not detail the facts of the *Florida Longhorn* case, but the holding does follow its *Continental Insurance* holding and conflicts with the Fourth District

Court of Appeal opinion relied upon in the opinion below. This can readily be determined from an examination of the appellate file which contains detailed findings of the fact by the trial judge interpreting the Inchmaree latent defect coverage for negligent installation of a connecting flexible hose between two ends of a water pipe, and allowed recovery as a latent defect because the wrong size clamps were used and the connection was hidden under insulation and not detectable.

II. Right to Remand for Resolution of Issues Reserved by Trial Judge

Respondent urges in its brief that Petitioner, not having appealed from the Trial Judge's reservation of ruling on a pertinent issue raised at the trial, i.e., estoppel and waiver, is now barred from raising this issue with this Court.

Respondent concludes that since no cross-appeal was taken, the issue is now dead and non-reviewable by this Court.

The import of this argument is that every appellee must cross-appeal to preserve undecided issues in case his judgment is vacated on appeal. Respondent thereby notes a dilemma in the rules, a trap not contemplated in their promulgation.

Petitioner does not believe that the rules of procedure or the statutes require every appellee to be placed in this dilemma.

The Petitioner won at the trial level and the Trial Judge felt it was unnecessary to rule on every issue raised at the trial, specifically stating he was not ruling on estoppel and waiver:

9. "This Court has reserved making a finding of fact as to the issue of waiver and estoppel due to the findings set forth above". (A. 4, A. 5).

However, when the Court of Appeals vacated the judgment, this issue became pertinent and the Petitioner, in moving for re-hearing, correctly requested the Fifth Circuit to remand the case to the District Court for resolution of the reserved issues.

The appeals court did not rule one way or the other and merely denied re-hearing. (A. 13).

It would seem therefore that the rules are either silent or defective to cover this type situation or it is covered and erroneously applied by the Court below.

This is a technical matter of procedure which requires this Court's attention for resolution.

1. Respondent's statement in its argument C that the issue was not reserved by the Trial Judge would seem to be in error.

CONCLUSION

It is respectfully submitted that this cause be reviewed to resolve Constitutional and procedural issue raised by the opinion below.

ARTHUR ROTH and
CHARLOTTE J. BARKAN ROTH
Attorneys for Petitioner
1111 Ainsley Building
14 N.E. First Avenue
Miami, Florida 33132

By: .....
ARTHUR ROTH

G. E. HARTWIG
Attorney for Petitioner
220 S.E. 12th Street
Fort Lauderdale, Florida 33316

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Reply Brief was mailed to WALSH, DOLAN & KRUPNICK, Attorneys for Respondent, 402 Court House Square Building, Fort Lauderdale, Florida this 26th day of July, 1972.

ARTHUR ROTH